IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

TUESDAY, THE 30TH OCTOBER 2007 / 8TH KARTHIKA 1929

CRL.A.No. 551 of 1998()

CC.5/1995 of ENQUIRY COMMR. & SPL. JUDGE, THRISSUR
DT.27.7.1998.

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APPELLANT: ACCUSED 1 & 2
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1. T.A.JOLLY, FORMER PRESIDENT,
KADAMAKUDY PANCHAYAT, S/O.AUGUSTINE,
THYKKOOTTATHIL HOUSE, KOTHADU,
ERNAKULAM.

2. K.MUTHU KRISHNAN, FORMER EXECUTIVE OFFICER,
KADAMAKUDY PANCHAYAT, S/O.NEELAKANDAN MAIR.
KOTTARATHIL HOUSE, KULANGARAMEETHAL,
KADUKADU, KASARAGOD. (DIED)

ADDL. APPELLANT 3 TO 5 IMPLEADED

3. P.MUTHU RAM PALERI, S/O. LATE K.MUTHU KARISHNAN

4. MANI KUMAR PALERI,S/O. LATE MUTHU KRISH

5. MANOJ KUMAR PALERI,
S/O. LATE -DO- -DO- ALL ARE RESIDING AT MUTHUMANI MANA
P.O. KODAKKAD, VIA THRIKARIPUR, KASARAGOD,DISTRICT.

LEGAL HEIRS OF THE DECEASED APPELLANT ARE IMPLEADED AS PER ORDER IN CRL.AMA. 10043/07 DT. 16.10.07 AS ADDL.APPELLANTS 3 TO 5.

BY ADV. SRI.B.JAYASURYA

RESPONDENTS: COMPLAINANT

STATE OF KERALA REP.BY THE
DEPUTY SUPERINTENDENT OF POL,
VIGILANCE AND ANTI CORRUPTION BUREAU,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.SRI.P.N.SUKUMARAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16/10/2007, ALONG WITH CRA. 553/1998, 552/1998 THE COURT ON 30/10/2007 DELIVERED THE FOLLOWING:

CRA. NO.551/1998

ORDER ON CRL.MP. 2929/1998 IN CRA. NO.551/1998

DISMISSED

30.10.2007 **SD/- K.R.UDAYABHANU, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

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K.R. UDAYABHANU, J.

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CRL.A.NOS. 551, 552 & 553 OF 1998

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DATED THIS THE 30TH OCTOBER 2007

JUDGMENT

Crl.A.No. 551/1998 is filed by Accused 1 and 2 in C.C.No.5/1995, Crl.A.No.553/1998 is filed by accused 1 and 2 in C.C.No.6/1995 and Crl.A.No.552/1998 is filed by accused 1 and 2 in C.C.No.7/1995. The appellants are the former President of the Kadamakudi Panchayat and former Executive officer of the above Panchayat. C.C.Nos.5,6 and 7 of 1995 were tried jointly in the Court of Enquiry Commissioner and Special Judge, Thrissur with respect to the offences under Section 13(1)(d) read with Sections 13(2) of the Prevention of Corruption Act, 1988 (hereinafter called 'the Act') and under Sections 409 and 120 B I.P.C. The appellants in all cases were convicted and sentenced in each of the cases to undergo rigorous imprisonment for one year and to pay a fine of Rs.5,000/- and in default to undergo rigorous imprisonment for six months each for the offence

under Sections 13(1)(d)(ii) read with Section 13(2) of the Act and rigorous imprisonment for one year each for the offences under Sections 409 and 120 B I.P.C.with a direction that the substantive sentences of imprisonment shall run concurrently. The offences related to the execution of the non-technical petty works in the Panchayat, the estimated cost of all of which were upto Rs.5,000/- executed during the period from May 1988 to March 1989. The prosecution allegation is that the works entrusted with A3 were either not executed at all or executed only in part and accused 1 and 2, the Panchayat President and the Executive Officer conspired with the third accused, the Contractor, and enabled the Contractor to obtain the amounts.

2. The third accused, the contractor died during the pendency of the proceedings before the court below and the 2nd accused, the Executive Officer died during the pendency of the appeal herein and L.rs. got impleaded.

3. The bills which were passed by the first and the second accused with incorporating false check measurements etc. The procedure for awarding the work is that the estimate

would be processed by the Executive officer and the Panchayat Committee can grant the administrative and technical sanction. The works after measured by the Executive officer in the presence of the concerned ward member and check measured by the Panchayat President completion certificate is issued. The bills are passed jointly by the President and the Executive officer. The prosecution allegations are with respect to the execution works and payments with respect to items 1 to 3 in C.C.No.5/1998 for Rs.3800/-, 3800/- and Rs.5000/- respectively and items 1 to 3 in C.C.No.6/1995 and items 1 and 2 in C.C.No.7/1995, all for Rs.5000/- each, i.e. altogether eight items of works. The bill amounts paid to the contractor as per bills are Rs.3743/- each for items 1 and 2 and Rs.4750/- for item No.3 in C.C.No.5/95. Rs.4751/- and Rs.4702/- were paid with respect to items 1 and 2 in C.C.No.6/95. Rs.4619/- was paid for item No.3 in C.C.No.6/95. Rs.4867/- and Rs.4886/-were paid with respect to items 1 and 2 and C.C.No.7/1995. It is the case that the loss sustained to the Panchayat in respect of works involved in C.C.No.5/95 amounted to Rs.7302.72, i.e. amounts paid towards

items 1 and 2; and Rs.4750/- said to have been paid for item No.3 which was found not substantiated by the court below. The loss sustained vide payments in C.C.No.6/95 is Rs.14072/- and the loss sustained with respect to the works in C.C.No.7/1995 is Rs.8934.51 as some of the works were not done at all and some works were executed only in part.

4. The evidence adduced in the matter consisted of the testimony of Pws.1 to 15 and Exts.P1 to P49 and X1 to X2(a). The defence examined Dws.1 and 2. The Special Judge found that item No.1 work in C.C.No.5/95 and items 1 to 3 in C.C.No.6/95 were not done at all and item No.2 in C.C.5/95 and items 1 and 2 in C.C.No.7/95 were done in part only which was found with respect to item No.3 in C.C.No.5/95. The evidence is not sufficient to find to substantiate the allegations that the above wok is not executed in full. It was concluded that on account of the non-execution or incomplete execution of the works involved in C.C.No.5/1995, the loss sustained is Rs.7302.72. C.C.No.6/95 Rs.14072/- and C.C.No.7/95, the loss sustained is Rs.8934.51. The defence case is that the complaints

are politically motivated and the investigation conducted was totally unfair and in fact the works were properly executed .

5. The spearhead of the contentions of the appellants is that in fact no investigation has been conducted by the Vigilance & Anti Corruption Bureau in the present matter and that the investigating officer who himself is not an empowered officer has just taken into custody of the available documents by recording mahazars and also allegedly recorded the statements of the witnesses. It is stressed that actually the investigating officer has not gone to the spot and he has not prepared even a mahazar. The evidence produced to support the allegation are just, the alleged reports of PW2, the Overseer and PW1 who is admittedly a non-technical person. It is pointed out that the alleged inspection by PW2, the Overseer which is relied on, i.e. the relevant entires in Ext.P37(b) report is not sufficient to convict the accused . Ext.P37(b) is the report with respect to the inspection done at a stretch of 89 works. The same is not enough and it is not witnessed by any independent witnesses. The above report is also made in the absence of the accused. It

is also pointed out that the inspection was done during the monsoon period and that the place is situated adjacent to the seashore and used to be inundated during rainy season.

6. It was on the basis of Ext.P8 complaint by PW4 and Exts.P37(d) and (e) complaints by other two Panchayat members alleging the irregularities in the execution of the petty contract works that enquiry was initiated and PW1, the District Panchayat Officer, Kanayannur Taluk was directed to enquire into the matter. While so, PW1 also received requisition from Dy.S.P.Vigilance, Ernkaulam to enquire into the matter on the basis of Ext.P38 compliant. Ext.P1 dated 29-4-1989 is an interim report filed by PW1 to the Director of Panchayats and Ext.P4 dated 12-6-1989 is the final report submitted by him to the Director of Panchayat. While so, PW2 the overseer of Piravom Panchayayt was asked to measure the works by the Deputy Director of Panchayat. He inspected all the works, i.e. 89 in number and submitted Ext.P37(b) detailed report dated 13-7-1989. It is pertinent to note that the complaints filed were with respect to the irregularities of the entire works executed

alleging criminal conspiracy and misappropriation of funds at the instance of the President of the Panchayat and the Executive officer and the Contractors concerned. The crime was registered by the Dy.S.P.Vigilance, Ernkaulam as Crime No.3/1991 vide Ext.P49 F.I.R. only after about one year, i.e. 31-8-1991. The Director of Vigilance investigation entrusted the investigation with PW14, the Vigilance Inspector. The investigating officer questioned the witnesses and took into custody of the concerned documents, i.e. about two years subsequent to the registration of F.I.R.vide Ext.P42 mahazar dated 2-12-1993, Ext.P45 mahazar dated 15-12-1993 and Ext.P48 mahazar dated 8-4-1994. The factual report was submitted to the Dy.S.P.and after obtaining sanction the final reports were filed in 1995. The final reports separating the charges period wise was taken cognizance as C.C.Nos.5,6 and 7 of 1995.

7. PW1 has proved Ext.P12(a) & P12(b), Ext.P21(a) to P21 (f), the measurement of disputed eight items of works and Exts.P13, P19, P22, P28, P30, P34 and P36, the bills with respect to the above works respectively. Ext.P21(a), P26(a), P31(a) are

the respective cheques of payment which are seen in Ext.P15 payment register and Ext.P16 cash book and Ext.P17 pass book and Ext.P32, treasury saving bank pass book.

8. It is mainly the evidence of Pws.1 and 2 who submitted Exts.P1 and P4 reports and Ext.P37(b) reports respectively and the evidence of PW3, the clerk of the Panchayat who helped PW2 to identify the alleged works that constitute the core of the prosecution version. Ext.P37(c) is the date wise statement submitted by PW3 as to the inspection by PW2. The works involved in C.C.No.5/1995 are items 27, 28 and 31 in Ext.P37(b) and items 29, 64 and 65 are items 1 to 3 works in C.C.No.6/95 and items 68 & 69 are with respect to items 1 and 2 were in C.C.No.7/95. Ext.P37(b) contains the inspection details of 89 works executed during the period 1988-89. It is reported by PW2 in Ext.P37(b) that items 1 and 2 works involved in C.C.5/95 were seen not executed at all. It is also stated that with respect to item No.2 earth work and gravel spreading is not done but only soil spreading is seen done. He has assessed the loss sustained with respect to the work in C.C.No.5/95 which, I have

mentioned above. It was found by the court below that the item mentioned as item No.3 that it is not executed at all is noted with respect to another portion and hence it was held that the finding in this regard by PW2 cannot be accepted and hence though loss with respect to works allegedly executed in C.C.5/95 would work out only Rs.7302.72 and not Rs.12052.72 as mentioned in the final report.

9. The works involved in C.C.6/95, PW2 has noted in Ext.P37(b) report that none of the above works are seen done and the amounts paid to the contractor, Rs.14072/- is the amount paid towards non-execution of the works.

10. With respect to the two works in C.C.7/95 it is mentioned in Ext.P37(b) report with respect to the work of filling with soil that it is seen done only partly and in both cases gravelling work is not done at all. The loss sustained or excess payment made with respect to the first item and with respect to the soil work was found to be Rs.1150.60 and with respect to the second item, it is Rs.775.91. The gravelling work not done in both the items amounted to Rs.3298 and Rs.3710/- and the total

loss Rs.8934.51. PW3 has proved Ext.P37(c) date wise statement of the inspection of works by PW2. PW2 is the person working in another Panchayat and perhaps not familiar with the areas in the Kadamakudi Panchayat. The technical competence of PW2 was not questioned. In the matter of identification of the spots involved, he was assisted by PW3 although Ext.P37(b) is assailed as doctored piece of evidence. I find that there is no evidence to show that PW2 has got any interest in the matter. Moreover, it can be seen on a verification of Ext.P37(b) that only with respect to a few of the works out of 89 works inspected by him that he has noted the serious irregularities. Ext.P37(b) also contains observations of inspection to the effect that certain works could not be measured on account of lapse of time or for other reasons. He has also mentioned as to the proper execution of most of the works and wherever it is not possible to measure and wherever the deficiency in the execution of the works are for justifiable reasons he has mentioned the same. He has stated that the gravelling work would remain in tact for two to three years. It is also pertinent to note that inspection by Pw2 was

done not belatedly as the period of execution of works was from May 1988 to March 1989 and the date of submission of Ext.P37 (b) is 13-7-1989. Further there is no evidence of any heavy rains or consequent water logging that would have washed away the works.

11. The evidence in support of the prosecution case mainly consisted of the testimony of Pws.1 and 2, the officials who inspected the works and that of PW11, Augustine who represented Ward No.I wherein most of the works involved was allegedly not executed or partly executed and that of Pws.4,5 and 11 who had submitted Ext.P38 complaint to the Superintend of Police, Vigilance, Ext.P37(d)complaint to the Director of Panchayat and Minister for Panchayat and Ext.P37(e) complaint to the Director of Panchayat and Taluk Panchayat Officer and that of Pws.7, 8 and 9, the local residents who supported the prosecution version as well as Exts.P1, P4 and P3(b) documents. All the items of work involved in C.C.6/95, 7/95 were Ward No.VI represented by PW11. Of course, it is mentioned that he is the opposition leader and hence his evidence as such cannot be

taken. But, I find that his version alone is not the evidence that support the prosecution case. PW13, Philomina Varghese who represented Ward No.VI did not support the prosecution and was treated as hostile and cross examined. It is the evidence of PW11 as well as the report of PW1 in Ext.P1 & P4 reports that the check measurements were not conducted in the presence of ward member as per the instruction under Rule 8 of the Kerala Panchayat (Manner of Execution of Public Works) Rules 1963. The results of the checking of files by PW1 revealed that the mandatory statutory formalities in this regard were not complied with. Irregularities were detected in the measurement book and at the time of check measurement. The details contained in Exts.P1, P4 reports by PW1 and that contained in Ext.P37(b) submitted by PW2 are in uniform and supported the prosecution case. Exts.P1 and P4 are the result of examination of files as well as site inspection and Ext.P37(b) is confined to site inspection. The contention that Ext.P37(b) did not contain elaborate details has no merits in view of the fact that PW2 conducted inspection of 89 works executed in the Panchayat during the relevant

period, i.e. from May 1988 to March 1989. It has also to be noted that the complaints, mainly Ext.P38 related to all the works executed during the relevant period in the particular Panchayat. As noted by the court below in relation to item No.2 work in C.C.No.5, the reports of Pws.1 and 2 is supported by the version of PW7, a local resident. With respect to item No.1 in C.C.No.5/95 non-execution of the work is reported by PW2 and PW1 and is supported by the version of PW8, another local resident. With respect to the period of execution of works, i.e. items 1 and 2 in C.C.No.7/95 as reported by Pws.1 and 2 is supported by the evidence of PW9. The only point found in favour of the accused is that there is no evidence that item No.3 work in C.C.5/95 is not executed in full. It is also pertinent to note that inspection by PW1 was conducted immediately after the date of execution of the works. Ext.P1 is dated 29-4-1989. March 1989 is the period of completion of the work. Ext.P4 is dated 12-6-1989 and Ext.P37(b) is dated 13-7-1989. Evidently the above short lapse of period is hardly sufficient to wash away the works in monsoon or high tide as contended by the

defence. The contention that the investigating officer has particularly done nothing and that he just took into custody of the relevant documents etc, I find, is without merit. There is no stipulated mode of investigation as such. It has come out in evidence that PW14, the investigating officer accompanied PW1. The alleged failure to prepare a scene mahazar by the investigating officer, I find, is no reason to reject the prosecution version as at best the same would amount only an irregularity and not sufficient to award an acquittal. PW14 has questioned the witnesses and took into custody of the documents and it has also to be noted that it was also at the instance of the Vigilance & Anti Corruption Bureau that PW1 conducted enquiry into the matter.

12. The other contention is that PW14 was not an empowered officer until 2-3-1993. The date of notification i.e. notification No.120994/C1/88/Vig. is dated 2-3-1993 in this regard empowering the officers of the cadre of PW14, i.e. Inspectors to investigate. As contended by the Public Prosecutor, the major part of the investigation was conducted by PW14 after

2-3-1993 as can be seen from the dates of taking into custody of the documents vide Exts.P42, P43, P44, P45, P46 & P47 mahazars which are dated 11-11-1993 and thereafter. Of course, it is stated by PW14 that he questioned the witnesses in 1992 also but the same is hardly sufficient to hold that the investigation as such is vitiated in the absence of evidence to show that prejudice has been caused to the accused (See **Sankarankutty v. State of Kerala, 2000 (2)K.L.T. 1; State of Haryana v. Bhajan Lal, AIR 1992 S.C.604; State Inspector of Police, Visakhapatnam v. Surya Sankaram Karri, JT 2006(8) SC 177**). It was contended that the appellants had apprehended persecution and had moved O.P.No.3649/89 before this Court and this Court as per judgment dated 25-4-1989 directed to the Superintendent of Police, (Vigilance) to ensure a fair and impartial investigation is conducted and yet it is PW14, the Inspector who conducted the investigation. I find that the direction of this Court in the above O.P.did not contain any specific instruction that investigation should be conducted by any particular officer. PW15, the

Assistant Commissioner has testified that it was he who registered the F.I.R., i.e. Ext.P49 and that he had conducted surprise inspection. There is nothing to show that the investigation has not been conducted properly. I find that the findings of the Special Judge is fully supported by the evidence adduced in the mater and there is nothing brought out to disturb the above findings. The conviction is confirmed.

Counsel for the appellant/A1 have sought for leniency pointing out that more than 18 years have elapsed since the commencement of the proceedings in the matter and that A1 is in his 60s and seriously laid up and that he was underwent amputation. Accused Nos. 2 and 3 are no more. It is also pointed out that the amount involved is not that large. In the circumstances, I find that imprisonment in the matter can be avoided. Sentence imposed on A1 for the offence under Section 13(1)(d) read with Section 13(2) of the Act is modified to imprisonment till the rising of the court and to pay a fine of Rs.25,000/- and in default to undergo simple imprisonment for one year in each of the cases, i.e. C.C.Nos. 5,6 and 7/1995. No

separate sentence is awarded for the rest of the offences. The first accused is granted two months time to remit the fine amount. He shall appear before the Enquiry Commissioner & Special Judge, Thrissur on 31-12-2007 to receive sentence. The appeals are disposed of accordingly.

Sd/-

K.R.UDAYABHANU, JUDGE

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P.S.TO JUDGE

K.R.UDAYABHANU, J

CRL.A. NOS.551,552 & 553
OF 1998

JUDGMENT

30-10-2007